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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS
DELTA MINING, INC. and G.M.W. COAL COMPANY

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May 13, 1975

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 495 F.2d 38 and is printed in Pet. App. A, pp. 1a-16a. The opinion of the District Court is not reported, but is printed in Pet. App. D, pp. 21a-24a.

QUESTION PRESENTED

Whether the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to prepare a decision incorporating findings of fact before a civil penalty can be assessed against a coal mine operator, even though the operator has failed to exercise his right to an administrative hearing, and even though the penalty can be enforced only in judicial proceedings where the operator is entitled to a trial *de novo* on all disputed issues of fact.

STATUTES AND REGULATIONS INVOLVED

1. Sections 109 (a) (1), 109 (a) (3), and 109 (a) (4) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 756-757, 30 U.S.C. 819 (a) (1), 819 (a) (3), and 819 (a) (4), are printed in the Petition at pp. 3-5. Section 109 of the Coal Act is printed in full in the Addendum to this brief (Add., pp. 4-6).

2. 30 C.F.R. Part 100, as published on January 16, 1971 (36 Fed. Reg. 779-780), is printed in the Petition, App. E, pp. 25a-32a. These are the regulations which were in effect when the penalties in these cases were assessed, and which were invalidated by the Court of Appeals.

3. 30 C.F.R. Part 100.4 (h) is printed in the Addendum to this brief (Add., pp. 14-15) This regulation is part of the regulations referred to in 2 above and is the regulation under which the Secretary attempted to give finality status to the penalties in these cases.

STATEMENT IN CLARIFICATION OF FACTS

The Petitioner's brief provides a generally satisfactory statement of facts. However, on some important facts of the case, the brief reflects omissions and statements which are misleading. It is therefore necessary to make this statement of clarification in order to place the facts and issues of these cases in proper perspective.

1. The Petitioner asserts that the provision of the Federal Coal Mine Health and Safety Act of 1969 at issue in this case is Section 109 (a) (3), 30 U.S.C. 819 (a) (3). (Pet. Brief, p. 5) This is only partially correct, as both Sections 109 (a) (3) and 109 (a) (1) are involved in this case. We acknowledge that Section 109 (a) (3), and what is required of the Interior Secretary by its provisions, is the linchpin of this case; however, the six statutory criteria in Section 190 (a) (1) are also of critical import,[1] because the Secretary has to comply with these criteria in order to afford due process and in order to comply with the express requirements of Section 109 (a) (3) of the Coal Act. Thus, consideration of both of these sections is essential to the disposition of this case.

2. The Petitioner's Brief refers to the notices served on Delta as "typical" and then goes on to describe all of the safety standards alleged to have been violated by Delta. (Pet. b., pp. 6-7). None of these notices or descriptions was at any time a part of the record in the proceedings in the lower courts. Moreover, the Delta material is most certainly not typical in respect to the modest amounts of the penalties, nor was the newly-opened operation at

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[1] The six criteria in Section 109(a)(1) *must be* considered by the Secretary in determining the amount of the penalty.

Delta a typical working mine.[2] The Delta material is typical, however, in its showing that the Assessment Officer assessed penalties on the sole basis of the inspector's sparse, unsworn notes. But the GM&W material is even more typical because the withdrawal order for an accumulation of loose coal and the attendant penalty of $5,000.[3] in that case presents a prime example of the illegality of the Secretary's assessment procedures and of his actions thereunder. The Respondents, in this instance, submitted a protest to show that the condition cited in the order constituted neither an imminent danger nor a violation of a safety standard in that GM&W has an extremely wet floor from natural water inlets, which resulted in a sloppy accumulation of coal that was too wet to be combustible much less an imminent danger.[4] (Add., p. 32) The Respondents never received any explanation for the rejection of this good faith defense.[5]

3. The Petitioner's references to the minimum penalty schecule in the Appendix A Guidelines may leave the impression that this schedule is not in issue.[6] (Pet. b.,

[2] The advance work to open up the Delta mine had been underway for less than ninety days when the notices were issued in January of 1972. The coal being extracted was related to the opening of a new mine shaft rather than to the "typical" production of coal from a working mine.

[3] App. p. 87.

[4] An accumulation of loose coal ranging from "damp to wet" and alleged to be an imminent danger, has been held not violative of the Coal Act and not subject to penalty assessment. Decision of the Department of the Interior Board of Mine Operations Appeals in Bishop Coal Co., 4 IBMA 521.

[5] Of course, the assessors stated orally that the defense was unacceptable because they could not consider any facts which were at variance with the inspector's notes in the order.

[6] 30 CFR 100.2(b)(1971)(Pet. P., p. 32a) The "Guidelines for Assessment of Penalties" provided a schedule of minimum

[footnote continued]

pp. 8-9) This is not the case. Respondents, GMW & Delta, have contended from the outset that the schedule of minimum penalties self-evidently precludes consideration of the six statutory criteria which the Secretary must consider before determining the amount of a civil penalty.[7]

4. The Petitioner makes reference to Section 100.4(h) of Title 30, CFR, January 16, 1971, and states that thereunder "the orders become the final orders of the Secretary pursuant to the regulations, and thus subject to enforcement in the district court when they were not paid forthwith." (Pet. b., pp. 10-11). This statement takes for granted that Section 100.4 (h) contained authority for bringing the herein orders to finality. Such is not the case, and Respondents have argued from the outset, as we do in Point III of this brief, that the Petitioner contravened his own regulations by the methods used in this case to give the orders finality status.

5. The phase of this case involving Judge Gourley's ruling on the legality of the assessment procedures has no

penalties under a scheme which treated each violation as falling under one of four classes of violations. The minimum penalties were: $5,000-$10,000 for a violation involved in an imminent danger withdrawal order, $1,000-$5,000 for violations in other withdrawal orders; $100-$1,000 for serious violations; and $25-$500 for non-serious violations.

[7] The Petitioner has contended that the footnote to the minimum penalty schedule, which provides that a penalty may be higher or lower than the minimum penalties, permits consideration of the six criteria. This footnote argument is not persuasive; since the statute says that the criteria *must be considered*, such a schedule is *per se* violative of Section 109 (a) (1) of the Coal Act. Also, the Assessment Office personnel who handled the penalties in these cases, stated that internal policy prohibited their use of the footnote to assess a penalty in an amount lower than the minimum penalties in the schedule.

pertinence to the disposition of this case, as that ruling was not based on a considered judgement of Respondents' motion and challenge to the penalty assessment orders. Indeed, in a January 16, 1973 hearing on another matter, Judge Gourley denied Respondents' motion before it had been drafted and served. (App., pp. 23-24; Add., pp. 6-8)

SUMMARY OF ARGUMENT

The crux of this case is that the Respondents were denied their due process rights by the Interior Department Secretary's Part 100 penalty assessment regulations and by his actions thereunder in respect to the civil penalty orders in this case.

The Respondents specifically contend that the herein civil penalty assessment orders were issued without any prior determination that any alleged violation of a health or safety standard had in fact occurred, and without any bona fide consideration of the Section 109 (a) (1) criteria for determining the amount of the penalty. Such orders were authorized by and were in conformity with the Part 100 regulations in effect when this case arose, and accordingly, these regulations too are invalid. The orders are also invalid because, by omitting therefrom express findings of fact relating to the occurrence of violations and to the six criteria in Section 109 (a) (1) for determining the amount of the penalty, and thereby providing no finding of the occurrence of violations and no evidence or assurance of bona fide consideration of the six criteria, the Secretary failed to comply with the express requirements of Section 109 (a) (3) of the Coal Act.

In ruling favorably on the Respondents' contentions, the Court of Appeals held that ". . . the assessment orders

in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid." In reaching this conclusion, the Court considered and expressly rejected the Secretary's argument that Section 109 of the Coal Act does not require findings of fact where, as in this case, no administrative hearing is requested. The Court's ruling is consistent in all respects with the clear and unambiguous text of Section 109 of the Coal Act, and it should be affirmed.

The Respondents further contend that, for reasons separate and distinct from the foregoing, the herein orders are invalid because the findings of fact that violations actually occurred were not made until several months and longer after the orders were issued, and because the Secretary did not follow his own regulations in attempting to give the orders finality status. Finally, Respondents contend that this case is moot because the regulations at issue in the case have not been used by the Secretary since April 1973.

ARGUMENT

I.

THE PENALTIES HEREIN ARE INVALID. THEY DENY DUE PROCESS AND ARE BASED ON PRO FORMA CONCLUSIONARY FINDINGS OF FACT THAT DO NOT COMPLY WITH SECTION 109 OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969.

In the proceedings below the Secretary has argued: (1) that the civil penalty orders in issue did contain findings that specific violations did in fact occur and that the assessment prescribed in the order is appropriate in light of consideration of the six criteria set forth in Section

109 (a) (1) of the Act, and further, that ultimate facts or even implied findings satisfy the requirements of the Act because of the nature of the operator's rights in any action brought in a district court to enforce a civil penalty order;[8] (2) that the issue of whether a violation occurred is determined against the operator in the penalty order and such issue is *res judicata* in any district court enforcement proceeding; and (3) that the Respondents did not exhaust their administrative remedies in the proceedings before the Secretary and thereby waived their right to object to the validity of the orders in this action.

All of these arguments have been abandoned at various stages of the prior proceedings. The Secretary now limits his argument to the contention that merely because an administrative hearing was not requested in this case, he somehow became exempt from the requirements of Section 109 of the Act in respect to the statutorily expressed procedures for assessing a civil penalty under the Act. The Secretary's remaining argument is as unsound as the ones which have been abandoned, as our argument shall demonstrate.

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[8] Section 109(a)(4) authorizes the Secretary to bring a civil penalty enforcement action in any appropriate district court. The Section provides that: ". . . the Court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a Court of Appeals under Section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the Court shall determine the amount of the penalty to be imposed."

A. The Secretary Denied Due Process by Depriving Respondents of Important Substantive Rights Guaranteed by Sections 109 (a) (1) and (a) (3) of the Coal Act.

The Petitioner's Brief has cast the issue put to this Court in terms of whether, in a case in which the coal mine operator has not requested an administrative hearing, the Secretary of the Interior Department must comply with the Section 109 (a) (3) requirement that "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, . . ." The contention is then made that the Secretary does not have to issue a decision which incorporates findings of fact in such a case. The Respondents' discussion of the issue, as cast by the Secretary, is set out hereinafter in points B, C, and D of this brief; however, we must first point out that the real issue in this case is the denial of due process and that the specific reason for our challenge of the penalties in the first instance was because of the Secretary's denial of important substantive rights which should have been honored before the point in time at which the decision with findings was required to be rendered as part of the final penalty orders. Indeed, the Secretary's denial of the Respondents' substantive rights in this case is what led to the Secretary's failure to make the statutorily mandated decision with findings of fact because, understandably, once the Secretary had denied these substantive rights, he was simply not in a position to render a decision with findings which said that such rights had been honored.

The substantive rights to which we refer are the right to have a pre-assessment determination that a violation of

a standard did in fact occur (Section 109 (a) (3)), and the right to have a bona fide, pre-assessment consideration of the six criteria for determining the amount of the penalty (Section 109 (a) (1)). The six criteria are set out as follows in Section 109 (a) (1) of the Act;

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The Secretary's Assessment Officer, Mr. Everett Turner, was delegated the responsibility of honoring these substantive rights, in the course of carrying out the internal processes for the assessment of penalties; however, as the record in the district court shows, the conduct of these internal processes was characterized not only by little or no concern for administrative due process, but also by a total disregard for the substantive rights conferred upon mine operators by the express provisions of the Coal Act. This is evidenced by the admissions of Mr. Turner himself in deposition testimony which was taken in *National Independent Coal Operator's Association v. Morton*, 494 F.2d 987, 994 (D.C. Cir.), and which was, in part, entered in the record of this case.

The Turner testimony in the record of this case (App., pp. 92-98) shows that he routinely failed in at least five major ways to administer the assessment procedures properly and fairly:

(1) he accepted the statement of the coal mine inspector, contained in the inspector's notice of violation,

as the finding that a violation of a health or safety standard had occurred, and he made no independent finding that a violation did occur;

(2) he made no written record of such finding even for the agency's own record-keeping needs;

(3) he did not document or make any written findings to show what consideration, if any, had been given the six statutory criteria in Section 109 (a) (1) of the Act, 30 U.S.C.A. 819 (a) (1), for determining the amount of the penalty;

(4) he gave no written explanation to the operator when he decided to affirm, amend, or vacate a proposed assessment, and he made no written findings of fact regarding such actions; and

(5) he provided no method by which the operator could learn the basis of the actions of the Assessment Officer, except by travelling to the office of the Assessment Officer where he might be informed orally and informally of such basis.

With respect to the finding of the occurrence of a violation, the Turner testimony establishes that such finding was based solely on the allegation in a notice of violation and that there was no written finding that a violation had occurred. With respect to the consideration of the six criteria for determining the amount of the penalty, the testimony shows that Mr. Turner made no documentation, written findings, or notes in respect thereto, even for internal record-keeping. It therefore becomes self-evident that these criteria did not receive bona fide consideration. It is thus abundantly clear that the Respondent's substantive rights were denied in the internal handling of the assessment procedures. These

rights are secured both by the Coal Act and minimum standards of due process and their denial renders the penalty orders invalid.

Even if the denial of substantive rights were absent from this case, the former Part 100 assessment procedures would still be illegal. While the procedures amounted to a quasi-formal pleading system, requiring a substantial volume of written facts, explanations, reasons, and documentation on the part of the mine operator, the Secretary imposed upon himself no responsibility at all to provide any useful documentation of what happened on his part in the assessment of penalties. Moreover, the procedures were obviously and necessarily designed for exchange of the requisite materials in writing and through the mails. Yet Mr. Turner's testimony shows that there was no way under the procedures for the operator to know the facts and reasons for assessments, except by arranging a meeting with the Assessment Officer in which such facts and reasons might be given orally and informally.

The Assessment Officer's mishandling of the six criteria for determining the amount of the penalty was the subject of a highly critical report issued by the Comptroller General of the United States following a study of the functions of the Assessment Office in the Spring of 1972. (App., pp. 88-91)[9] Based upon analysis of a sample of 400 violations assessed by the Assessment Office from April through December 1971, the Comptroller General's Report concluded, *inter alia*, that the adequacy of the consideration of the six criteria could

[9] In follow-up Congressional hearings on this report, the subcommittee chairman characterized the former regulations as an "inexcusably sloppy method." Hearing before Subcom. of Com. on Gov. Operations, "Enforcement of Fed. Mine Health and Safety Laws," p. 542.

not be determined, primarily because there was no documentation to show how or whether the assessor considered the six criteria and because there were no written guidelines for the consideration of the criteria. The report also concluded, again because of the lack of guidelines, that the mine operators did not know how the six criteria should be considered in determining the amount of a penalty.

If the professional analysts in the Office of the Comptroller General could find no information on which to determine what consideration, if any, had been given to the six criteria, it follows with even more certainty that the mine operator had no information with which to make that determination. It also follows that, so long as such information is not available to the operator, he is deprived of his right to make an informed judgment on how he shall respond to the assessment action, and also is deprived of his right to make his own judgment on whether the six statutory criteria were properly considered.

The Court of Appeals, after finding that the herein penalties are invalid, took notice of the Comptroller General's Report in the following comment:

> ". . . we observe that the Bureau of Mines had not, at the time these assessments were made established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines led the Comptroller General, in a report on the Bureau of Mines, to state that:
>
> > 'We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in (400) sample cases.'
>
> * * *

> '. . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty.'
>
> "Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount."

The statement of the Court of Appeals is sound. The herein penalties were issued under laws which secure to the Respondents the substantive right to have the six statutory criteria properly considered and the right to have a proper finding of fact in respect to the occurrence of a violation. Both of these rights were denied by the Secretary's former Part 100 regulations and by his actions thereunder, and therefore, the Court of Appeals correctly found the penalties to be invalid.

B. Section 109 (a) (3) of the Coal Act Required the Secretary of the Interior Department to Render a Decision incorporating Findings of Fact in These Cases.

Section 109 (a) (3) of the Coal Act provides that a civil penalty shall be assessed ". . . only after . . . the Secretary has determined by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." This language is plain and clear on its face, insofar as it requires findings of fact before the Secretary can issue a final order of assessment and no distinction is made between assessments in

hearing and non-hearing situations.[10] The Secretary himself at various times has subscribed to this construction and understanding of Section 109 (a) (3).

When the Secretary initially implemented the Coal Mine Health and Safety Act in March of 1970, he published regulations which provided for civil penalty assessments to be determined by a hearing examiner, with a right of appeal to a Departmental appeals board.[11] If the Secretary had adhered to this procedure of making assessments by a juridical officer, or if he had instituted his present regulations from the outset, there would be no basis for the present litigation.

However, some nine months after publication of these first regulations, the Secretary adopted the Part 100 procedures which eliminated the rule that required a hearing examiner to perform the initial assessment function. Instead, the assessment function was transferred to an Assessment Officer who issued the assessment orders at issue in this case. Such orders, as the Secretary now concedes, did not comply with the express provision of Section 109 (a) (3) which authorizes the assessment of a penalty only after the Secretary has rendered a decision with findings of fact.[12] The

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[10] "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inferences in every direction." *Ex Parte Collette*, 337 U.S. 55.

[11] Title 30 C.F.R. Part 301, published March 25, 1970; Federal Register, Vol. 35, pp. 5255-5258. These regulations were subsequently recodified as 43 C.F.R. Part 4, section 4.540 et seq.

[12] The orders were issued on pre-printed forms bearing the facsimile signature of the Assessment Officer and having blank spaces for the name and address of the coal operator, the name of the mine, the date of the order, the list of alleged violations, and the amount of the penalty. In rejecting the Secretary's contention

[footnote continued]

Secretary contends that such orders are, nonetheless, valid because he is exempt from the civil penalty assessment provisions in Section 109 (a) (3) where, as in this case, an administrative hearing has not been requested.

The Secretary's claim of exemption relates to the first sentence of the three-sentence text of Section 109 (a) (3):

> "(3) *A civil penalty shall be assessed* by the Secretary *only after* the person charged with a violation under this Act has been given an opportunity for a public hearing and *the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted*, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. (Emphasis provided)"

It is difficult to perceive how one could possibly read the clear and straightforward language of the foregoing first sentence as being addressed solely to the situation where the hearing right has been exercised. The use of the conjunctive "and" in the text has joined together as a single unit the phrase involving the hearing opportunity with the phrase involving the Secretary's decision with findings of fact. Indeed, one could scarcely find a more

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that the orders contained adequate findings of fact, the Court of Appeals cited Environmental Defense Fund, Inc., v. Ruckleshaus, 439 F.2d 584, 596 (D.C. Cir. 1971), K.C. Davis Discretionary Justice, ch. VI (1969), et al.

ordinary and natural conjunction of phrases. The text thus expresses a unity of procedural steps which applies to the assessment of any civil penalty, either in a hearing or in a non-hearing situation, and any construction to the contrary would amount to rewriting the text of the statute.[13]

Self-evidently, the text of Section 109 (a) (3) gives the person charged two distinctly different rights: (1) the right of an administrative hearing, and (2) the right to have the Secretary abide by the specified procedures when a civil penalty is assessed. The statute says not one word about these rights being in tandem, or that the second right is some sort of inchoate right which does not become fully vested unless the first right is invoked.

The first right does not depend upon whether the person charged has in fact violated a health or safety standard. It comes into existence when an allegation of violation is made. The second right, in contrast, does not even come into play until the person charged is found to have violated a standard, but when this happens, the six statutory criteria in Section 109 (a) (1) for determining the amount of the penalty also come into the picture. At this juncture the considerations being determined are too numerous and too important to assume that the Congress intended for them to be made without a reasonable explanation of their basis to the person being assessed. Clearly, the Congress intended to say just what it did say in spel'ing out the assessment requirements in Section 109 (a) (3), and the text provides not even a hint that any exception to these requirements was contemplated.

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[13] See footnote 20 in the decision of the Court of Appeals which noted that words in statutes ordinarily should be accorded their most common, everyday meaning. McBoyle v. United States, 278 U.S. 41, 48 (1928).

The Secretary's argument to the contrary carries no logic. For example, if the Secretary is correct in asserting that the first sentence in Section 109 (a) (3) is limited to the situation in which the operator has exercised his right to have a hearing, the statutory text is then left barren of any enabling language that empowers the Secretary to assess civil penalties in a nonhearing situation. The provisions in Section 109 (a) (1), which empower the Secretary to assess a civil penalty, also prescribe that such penalty "shall be assessed by the Secretary under paragraph (3)" of section 109. Hence, if the text in paragraph (3) applies only to a hearing situation, the Secretary is then left without any express statutory power to assess a civil penalty in a non-hearing situation, because the first sentence in paragraph (a) (1) and the first sentence in paragraph (a) (3) of Section 109 are the sole source of penalty assessment authority to be found in the entire Act. This result, though obviously an absurb and unacceptable one, is exactly where we are lead by the Secretary's argument concerning Section 109 (a) (3).

One of the most fatal defects in the Secretary's contention is revealed by his own argument to the effect that both the first and third sentences of section 109 (a) (3) relate exclusively to the situation where a hearing is held. The third sentence makes any penalty hearing subject to Section 5 of the Administrative Procedure Act,[14] which by incorporating Section 8 of the APA,[15] requires that the final decision of the Secretary in such hearing shall be accompanied by findings. As noted by the Court of Appeals, "this tends to indicate that findings are required when a violator does not seek a hearing as

[14] 5 U.S.C. Section 554.

[15] 5 U.S.C. Section 557.

well as when he does . . . Thus the language in Section 109 itself requiring findings [the first sentence of Section 109 (a) (3)] would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held." In a torturous attempt to dispel the force of this point, the Secretary states that the Congress wanted to make several procedural requirements applicable to a penalty hearing, including the requirements for findings of fact, and that, in order to accommodate this aim, the Congress had to refer to Section 5 of the APA since it otherwise would not have applied. If this premise is valid, then the conclusion of the court below is reinforced because the premise strongly suggests that the reference to a decision with findings of fact in the first sentence of Section 109 (a) (3) applies *only* to a non-hearing situation. Sensing that this unacceptable construction is where the argument leads, and that he must explain the use of "decision incorporating . . . findings of fact" in the first sentence, the Secretary speculates that "Congress could have thought that if it simply referred to Section 5 of the APA without more, findings of fact *after a hearing might not be required*." (Pet. b., p. 21) This is farcical, palpably so. The Congress may have some deficiencies, but a deficiency of legal counsel to advise on the content of an Act (APA) that has been in effect for almost three decades is not among them.[16] On its face, the first sentence of Section 109 (a) (3) governs the assessment of any penalty assessed under the Act and speculation about what the Congress might have thought, or that the sentence might have been written differently, will not alter this fact.

[16] The APA has been law since June 11, 1946.

When the Court of Appeals considered this case below, the court was fully cognizant of the decision in *NICOA v. Morton, supra*, p. 9, wherein the Court of Appeals for the District of Columbia had concurred with the Secretary's argument about the construction of Section 109 (a) (3). Thus the court below not only considered in depth all facets of the Secretary's entire argument about Section 109 (a) (3) (wording of statute, legislative history, etc.), but also had the benefit of its sister court's reasons for concurring with the Secretary's argument. The court below rejected the Secretary's argument, as well as the NICOA decision, and concurred with the Respondents' position that, whether or not the operator requests a hearing, the language of Section 109 (a) (3) requires that a penalty assessment must be made by the Secretary's "decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." The court stated:

> "The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such findings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid."

The Court also noted that the requirement of findings of fact might well have a salutary effect on the administration of the Act's civil penalty provisions:

> "Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not worsen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders

> entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings."

As we have previously noted, the Secretary's first civil penalty assessment regulations contained provisions which complied with the assessment requirements of Section 109 of the Coal Act and which provided substantial protection of a coal operator's rights to administrative due process. These first regulations were published on March 25, 1970 under faulty publication procedures and then republished properly on November 18, 1970. Then, about two months later, the Part 100 regulations at issue in this case were published on January 16, 1971. This historical note points up that in the early administration of the Coal Act, the Interior Department's assessment regulations openly acknowledged that a civil penalty was required to be assessed in accordance with the express requirements of the Coal Act. The former Part 100 regulations no doubt served the administrative convenience of the agency administering the Coal Act, but they have worked to deprive these Respondents of substantive rights secured by the Coal Act, as well as of administrative due process rights. It is

axiomatic, however, that the jurisdiction and power of an administrative agency depends entirely upon the terms of the statute reposing power in it. The agency cannot confer power upon itself or alter the terms of its governing statute, and the agency must meet and comply with the conditions and provisions of the statute. Although these tenets were cast aside in favor of administrative convenience under the former Part 100 regulations, they have been revived by the Court of Appeals' ruling which invalidated the Part 100 regulations. There the matter should rest.

C. There is no Legislative History to Support the Proposition that the Section 109 (a) (3) Decision with Findings of Fact are Required Only in a Hearing Situation.

The Secretary concedes, as he must, that his point A argument does not satisfactorily establish the soundness of his construction of Section 109 (a) (3), and that he must look to the legislative history of the section to shore up his argument. (Pet. B., p. 24)

We shall have no difficulty in showing that the legislative history offers no succor to the Secretary's argument. Preliminarily, though, we assert that the discussion of legislative history does not even belong in this case because, as is so well settled as to require no citation of authorities, the courts resort to legislative history of a statute only when the statutory text is in some way ambiguous, unclear, or in conflict with another provision of the statute or with another statute. None of these elements exist here as was noted by the court below.[17]

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[17] ". . . There is no need to refer to the legislative history where the statutory language is clear . . ." *Ex Parte Collette, supra*, p. 15.

[footnote continued]

The threshhold defect in the legislative history presented by the Secretary is that it is counterfeit. The central basis of the Secretary's construction of the history of Section 109 (a) (3) is a passage from the narrative part of the Conference Report on the bill which became the Coal Act. This passage, in the Secretary's discussion of the legislative history, is treated as an expression about the content of the final bill by both the Senate and House members of the Conference Committee.[18] (Pet. b., p. 26) This is not correct. The narrative part of the Conference Report which is entitled "Statement of Managers On The Part Of The House," and which is the source of the extracted passage, was signed by the House members only. [19] It was never agreed to or signed by the Senate members of the Conference Committee. The text of the statutory language accepted by the House-Senate Conferees is the only part of the Conference Report on the coal mine legislation which was agreed to and signed by both the House and Senate members of the Conference Committee.[20] Indeed, when the coal bill was considered in 1969, the authorship of the narrative

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Footnote 15 in the decision below stated that: "Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. See Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947)."

[18] The *NICOA* decision also treats this passage as a consensus statement by both Senate and House members of the Conference Committee. (Pet. Writ, App. G, p. 71a)

[19] See Add., p. 27 for signature page in Conference Report which evidences that only House Conferees signed the "Statement of Managers." Also, Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, p. 1057.

[20] See Add., pp. 26-27 for signatures following text of bill.

statement in a Conference Report was a carefully guarded, unilateral right of the House Conferees. This did not change until the enactment of the Legislative Reorganization Act of 1970, which provided for the Conference Report to contain a statement ". . . prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate." [21]

It is therefore obvious that the source material on which the Secretary's legislative history is based, fails to reflect a House-Senate consensus on the legislative intent of Section 109 (a) (3) and thus the legislative history is inconclusive with respect to such intent. The text of the section must therefore be interpreted and applied as written.

Aside from the foregoing, the Secretary's construction of the legislative history is not supported by the record of the Congressional proceedings on the Coal Act. The Secretary's construction of the history starts with the premise that a decision with findings of fact would have been necessary only in a hearing situation if either one of the coal mine bills before the Congress, H.R. 13950 or S. 2917,[22] had been enacted into law, and consequently, Section 109 (a) (3) in its present form applies only to a hearing situation. The premise of this construction is fallacious and the Secretary has not produced a single item of tangible evidence to support these inferences. Indeed, the evidence in the House and Senate Committee Reports on the Coal mine bill—the most informative

[21] Add., pp. 21-33, extract from P.L. 91-510, Oct. 26, 1970, 2 U.S.C. 190C. See Add., p. 24 for pertinent extracts from Senate Committee Report leading to Act, and Add., p. 28 for an example of a Conference Report after 1970.

[22] The pertinent penalty provisions in the two bills are set out in the Pet. b., pp. 24-25.

documents involved in the legislative history of the text in question—is very much to the contrary.

The Committee Report on the House bill, in speaking about the penalty provisions of H.R. 13950, stated as follows:

> "Any penalty assessed under this section is, upon request, subject to review by the Board. The Secretary may initiate the collection of any penalty by civil action in the appropriate district court of the United States." [23]

In sharp contrast the Senate Committee Report on the Senate bill S. 2917 stated that:

> "An order assessing the penalty *would be issued after a hearing and decision on whether or not the penalty is warranted and on the amount of the penalty. The hearing and decision would be subject to 5 U.S.C. 554.*" [24] (Emphasis provided)

The above passage from the House Report confirms that the House bill permitted a penalty assessment without a hearing, and that the hearing right would have to be expressly requested. However, the House assessment provision was rejected in Conference. Furthermore, when the passage from the House Report is read in conjunction with the italicized passage in the Senate Report, it becomes abundantly clear that instead of having the common characteristic of excepting a decision with findings of fact in a non-hearing situation, the bills were in fact poles apart in their penalty assessment procedures. Consequently, while the Secre-

[23] H. Rep. 91-563, 91st Cong., 1st Sess., Legislative History of Federal Coal Mine Health and Safety Act, by the House Committee on Education and Labor, p. 569.

[24] S. Rep. 91-411, 91st Cong., 1st Sess., Ibid p. 93.

tary's premise is correct in respect to the House bill, the premise has no validity at all in respect to the Senate bill because the Senate Report made it clear that the Senate bill conceived of assessing penalties only in a hearing context and that non-hearing penalties were not even contemplated.[23]

The Senate text was adopted by the Conference Committee with minor changes and no change at all in the requirement in dispute in this case. The requirement that a civil penalty shall be assessed ". . . only after . . . the Secretary has determined by decision incorporating findings of fact" was in the Senate bill prior to the conference and it remained unchanged in the final bill which was agreed to by the Conference Committee, and which was signed into law by the President on December 30, 1969. If the result urged by the Secretary had indeed been within the contemplation of the Congress, this would have been a matter of major import in a statute imposing sanctions as severe as those in the Coal Act and would have without question warranted a clear explanation in the record. However, since the slight change made in the Conference did not affect or even touch upon the requirements for a decision with findings of fact in the Senate bill, the House Manager's Statement in the Conference Report was silent on the reasons for the change, as was the record elsewhere in the legislative proceedings on the bill. [26]

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[25] The serious concern in the Senate that operators be afforded full procedural due process under the penalty provisions is reflected in the discussion of such provisions on the Senate floor. See Legislative History, pp. 462-63; pp. 509-510.

[26] The sole effect of the Conferee's change in the language of the Senate bill was to permit a penalty to be assessed without an administrative hearing in every case.

The Court of Appeals considered the legislative history, as construed by the Secretary, and concluded that it failed to support any deviation from the express requirements of the Act. The court stated:

> "Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested."

D. It is Unsound to Release the Secretary From the Requirement to Render a Decision With Findings of Fact, Because This Would Shift the Administrative Responsibility From the Secretary to the Courts.

The Secretary's ultimate objective, as revealed in the argument in Points C and D of Petitioner's Brief, is to escape from the trouble and work entailed in the reassessment of the penalties which were invalidly assessed under the former Part 100 regulations. The Secretary's original claims about the dimensions of the reassessment work put the cases at 2,400 and the number of violations at 24,000.[27] However, following the Respondents challenge of these claims,[28] the Secretary's auditors took another look at the situation and reduced the count to 2,050 cases and to 18,350 violations.[29] This reduction of 350 cases and 5,650 violations amounts to a

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[27] Petition for Writ, p. 13.

[28] Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 4-5.

[29] Reply Memorandum for Petitioner, App., p. 1.

23% smaller work load of violations than the Secretary originally claimed,[30] but the Secretary contends that even the reduced number of cases would require 300 man weeks to reassess.

Underlying the entire argument about the administrative burden is the blithe assumption that what is hard for the Secretary to do administratively becomes easy to do merely by shifting the work to the district courts. This is unrealistic. The work involved in purging the defects from the 2,050 outstanding cases is there to be done and, if the cases were shifted to the district courts, the work would still be there to be done. Indeed the physical dimensions of the task could well be vastly greater in court actions than if performed administratively. For example, in this very case, the attorneys of the Secretary estimated that their part of the trial time in the GMW case at a week and a half to two weeks and in the Delta case at two and a half days. (App., p. 42) If we apply the attorneys' estimate of a total of about twelve and a half days of trial time to the Secretary's calculation of the number of cases, the trial time involved in the 2,050 cases would be in excess of 2,000 man weeks for a single government attorney. We are speaking about federal manpower in either instance, whether the task is performed in the Secretary's department or in the district courts, so, obviously, the Secretary's doing the task with 300 man weeks of federal manpower is much the better option.

We recognize, though, that our projections of needed resources, as well as those of the Secretary, are inconclusive and we therefore submit that the actual experience under the present regulations affords a better

[30] The reduction in violations is 23.54%; in cases 14.58%.

base of information by which to measure the reassessment task if it is done administratively.

In 1974, the Interior Department's Office of Hearings and Appeals docketed 12,539 penalty cases. Of that total, the cases not involving an administrative hearing and disposed of by an Administrative Law Judge (ALJ), numbered only 382.

The 12,539 cases were docketed under the present procedures by reason of Section 100.6 (a) of Title 30 which requires that all violations not disposed of in conference must be forwarded to the Associate Solicitor for the filing of a petition to assess a civil penalty pursuant to 43 C.F.R. 4.540.[31] Since both hearing and non-hearing situations must be referred to an ALJ for disposition under these regulations, it would appear that the 382 non-hearing penalty cases in 1974, slightly over 3% of the total cases docketed, provide a valid indicator of the manageable nature of the work involved in reassessing the 2,050 outstanding penalty cases involving 18,350 violations.[32]

But even if the burden of reassessment were in fact an arduous one, this would not serve to validate the invalid Part 100 penalty orders. Nor would it justify the dumping of the Secretary's assessment work onto the district courts, for this would go against the grain of this

[31] Add., pp. 19-21. These regulations involve a procedure similar to the one under attack in this case in that Section 100.4(c) permits the Assessment Officer's order to become a "final order" if the operator does not request a hearing. However, the procedure is inoperative if a conference is requested by the operator because, under another provision in the same section, such a request renders Section 100.6(a) applicable.

[32] The 382 cases were handled promptly by the Administrative Law Judges, and no backlog occurred. Information received from the Office of Hearings and Appeals on April 1, 1975.

government's long accepted concept of assigning functional responsibility to an administrative agency with the courts being granted the power to assure that such function is properly performed. The Congress clearly intended for the Secretary to administer the civil penalty provisions of the Coal Act up to the point of the issuance of a valid, final order. The mere fact that such responsibility may now involve an arduous task because of the Secretary's own actions is no reason why he should be released from this statutory obligation.

The arduous task argument is thus unsound, as are the other reasons offered by the Secretary to justify the use of the district courts to launder the defective penalty orders. For example, the facts of this case forcibly refute the contention that "the Secretary need not prepare a formal decision *where there is no dispute and the operator evidences his satisfaction with the proposed penalty* by choosing not to request a hearing." (Pet. B., p. 35) (Italics ours) This statement, along with a similar statement in the *NICOA* decision, supra p. 10, falls into error through a gross misconstruction of the facts. In all cases where the operator has filed a protest to a proposed or amended assessment order, the last word which the Assessment Officer hears from the operator is contained in a written protest which can only be read as evidencing dissatisfaction with the proposed penalty cases and disputing its basis. This is doubly true in this case because, following receipt of the penalty orders, Respondents wrote to the Assessment Officer stating that:

> "This is to advise you that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of the penalties before the U.S. District Court.

> "We have expended a great deal of time and gone to considerable expense to present to your office facts and circumstances bearing on the six statutory criteria, and in no instance has your office shown any disposition to give any considerations to the merits of our position on any of the matters that we have presented. Your office has admitted that it has no discretion to deviate from the published minimum penalty schedule, despite the footnote reference which authorizes lesser penalties and no authority to vacate a citation even if shown to be erroneous."

This unequivocal challenge of the penalties refutes any claim that the Respondents accepted the penalties without dispute. But, as previously noted, even if this challenge had not been made, the Respondent's prior protest under the procedures disputed the penalties and any argument to the contrary reflects an erroneous construction of the facts.

The Secretary falls into further error in the suggestion of an interrelationship between Sections 109 (a) (3) and (a) (4) of the Coal Act, The assessment procedure, including opportunity for an administrative hearing and decision with findings, is provided by Section 109 (a) (3) and the opportunity for *de novo* review in district court, including a jury trial on certain issues when requested, is provided by Section 109 (a) (4). These are two entirely different and unrelated sets of rights which the Act has conferred upon the operator. The right of a hearing before the agency and the right of a hearing in court have no significance to one another. The operator is free to exercise his rights to have either or both of the hearing proceedings, or to have neither proceeding. Whatever he does, no procedural or substantive advantage results to the Secretary because the Secretary has not given up

anything or otherwise been prejudiced by the operator's exercise or non-exercise of his rights under the Act. And, although a *de novo* trial may serve to cure some of the ordinary and occasional defects in administrative proceedings, this by no means implies that a *de novo* trial can serve that purpose in the situation which obtains in this case. Here, major defects have invalidated each and every order involved in the same identical way and, moreover, such defects have occurred on a massive scale. Furthermore, no weight or relevance can be given to the Secretary's statement that leniency had been granted under the minimum penalty schedule, by the imposition of penalties at the lower limits of the schedule, and hence the Respondents had no need for information on how the penalties were arrived at. (Pet. b., p. 35)[33] Since the minimum penalty schedule necessarily precluded consideration of the six statutory criteria in Section 109 (a) (1), its use by the Assessment Officer was merely another illegal incident in the gamut of illegal assessment actions. And finally, the Secretary's suggestion that the operator's sole interest in the decision with findings of fact is to prepare for court litigation is simply not true. The Operator's main interest in the decision with findings is to have information which tells him in a meaningful way the basis of the decision that he has violated a standard, when such is the fact, and that the statutory criteria for determining the amount of the penalty have been properly applied to his case. As was discerned by the Court of Appeals, where such information is forthcoming, penalties may generally be resolved on the basis of the orders without either party having the expense of an administrative

[33] The minimum penalty schedule is called "Appendix A Guidelines". Pet. for Writ., App. E, p. 32a.

hearing or a court action.[34] This is certainly true in respect to these Respondents and we are confident that it is true in respect to the majority of the operators involved in penalty cases under the Coal Act.[35]

Throughout this entire proceeding, beginning with Respondents' dealings with the Assessment Office and continuing into the court action, the Secretary's approach to these matters has been based on the notion that he is just another private party in an adversary proceeding and that he, like a private party, can somehow gain an advantage from the actions or inactions of the other litigant. This should not be so. The Secretary is the head of a powerful agency of a powerful government. Such enormous power implies an obligation on his part to exercise restraint and self-discipline against misuse and abuse of his powers. Such enormous power further implies that the Secretary is charged to comport himself in strict accord with the letter of the law. Indeed, his conduct should be exemplary. What an operator does nor does not do with his rights under the Coal Act, does not lower or remove the Secretary's obligation to carry out his duties under the Act properly; the Court of Appeals correctly directed the Secretary to honor his obligation and that directive should stand.

[34] Supra, p. 20. As stated by the Court of Appeals: "Where the proposed orders . . . and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessment by way of either administrative hearings or judicial proceedings.

[35] 11,000 penalty cases were docketed in the Office of Hearings and Appeals on July 1, 1974, as compared to 8,000 cases docketed on March 31, 1975. This decline of 3,000 cases evidences a definite trend toward resolution of penalties without an administrative hearing.

II.

THE HEREIN PENALTIES ARE INVALID, BECAUSE THEY WERE ASSESSED LONG BEFORE ANY FINDINGS OF FACT WERE MADE THAT THE ALLEGED VIOLATIONS FOR WHICH PENALTIES WERE ASSESSED HAD IN FACT OCCURRED.

Section 109 (a) (3) of the Coal Act, and the failure of the Secretary to comply therewith, was a major subject of our preceding argument in Point I. On the issue argued here, we shall show that Section 109 (a) (3) was also violated because the findings of fact that violations actually occurred were not made until several months and longer after the penalty orders were issued.

As shown on the face of the exhibits annexed to the Complaints filed in the District Court, the Orders of Assessments were issued on dates as follows: The single order in the Delta case was issued on April 11, 1972 (App. 9); the three orders in the GM&W case were issued on December 27, 1971 (App. 61), January 24, 1972 (App. 64), and May 31, 1972 (App. 58). (These orders are hereafter respectively referred to as Order Nos. 1, 2, 3, and 4.) Also as shown on the face of these exhibits, none of these orders contained any findings of fact that the violations of health and safety standards for which penalties were assessed had in fact occurred, and thus, on the date of their issuance, not a single one of the four penalty assessment orders was supported by a finding that GM&W and Delta had in fact violated any of the standards for which they were assessed penalties.

The Secretary apparently became aware of this fatal legal defect in the assessment orders when court enforcement was contemplated, because, belatedly, under date of August 17, 1972—only about two months before the filing of these actions—the Secretary's Assessment

Officer, Mr. Everett Turner, issued findings that the violations covered by each of the four orders did in fact occur. These findings were issued on pre-printed forms bearing Mr. Turner's facsimile signature and having blank spaces for the name of the operator, the case number, and the date to be typed in. (App. 8, 60, 63, and 57)

The August 17, 1972 date on these findings of fact shows that the Secretary and/or his Assessment Officer totally defaulted in their duty under the Act to make such findings before assessing penalties. Furthermore, in attempting to cover up their indifference to the statutory mandate, they issued findings which came so long after the assessments were issued that under no stretch of the imagination could their act be regarded as excusable error. The August 17, 1972 findings of fact were issued *almost four months after* Order No. 1, *almost one year and eight months after* Order No. 2, *almost seven months after* Order No. 3, and *almost four months after* Order No. 4.

Moreover, even though the Secretary's Assessment Officer made these findings of fact about two months prior to the filing of this action, the findings were not served even at this late date upon the Respondents. Consequently, the Respondents had no knowledge at all of the findings of fact until their receipt as exhibits attached to the Complaints.

Section 109 (a) (3) of the Coal Act clearly requires that "findings of fact . . . that a violation did occur" shall be made before assessment of a penalty. Then, and only then, is the Secretary authorized to assess a civil penalty. But it is crystal clear that the Secretary did not make such findings before assessing the penalties in this case. Furthermore, after defaulting in the duty to make such pre-assessment findings, the Assessment Officer took

action to cure this default by making post-assessment findings of fact. This action does not cure or obscure the invalidity of the assessment orders, however. It only shows again a disregard for administrative due process and the procedural requirements of the Coal Act. Consequently, and irrespective of how it came about, the penalty assessment orders in this action were issued without any findings of fact that the Respondents had in fact violated any health or safety standard under the Coal Act. The assessment orders are therefore invalid and not enforceable.

III.

THE SECRETARY AND/OR HIS AGENTS FAILED TO COMPLY WITH HIS OWN REGULATIONS IN DECLARING THE HEREIN PENALTY ASSESSMENTS TO BE THE FINAL ORDERS OF THE SECRETARY.

When the assessment orders were issued in this case, the Respondents neither accepted the orders nor requested a hearing. The situation involving neither acceptance of an order nor a hearing request was not covered by the regulation under which an order was brought to finality during the period in question and consequently, the orders in this case are not final orders under the applicable regulations.

Under Section 100.4 of the assessment regulations published on January 17, 1971, Mr. Everett Turner, the Secretary's Assessment Officer was given the authority, after review of each notice of violation or order of withdrawal, "to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be imposed." (Add., pp. 13-15) The steps which Mr. Turner was required to administer, as specified by the regulations and as pertinent to the finality question at issue, are as follows:

(1) The Assessment Officer shall serve by certified mail a Proposed Order of Assessment upon the operator or miner charged. (Section 100.4 (b), Add. p. 13)

(2) The Proposed Order of Assessment shall advise the operator or miner charged that he has 15 working days after receipt of such order to protest the proposed assessment. (Section 100.4 (d), Add., p. 14)

(3) When an operator files a protest the Assessment Officer may reconsider the proposed assessment and may amend or reissue the Proposed Order of Assessment (Section 100.4 (g), Add., p. 14)

(4) The next step-the one at issue here-is contained in Section 100.4 (h) which provides that the operator or miner has 15 working days within which to accept the amended or reissued order, "*whereupon* it shall become the final assessment order of the Secretary," *or* to request formal adjudication with opportunity for a hearing. (Emphasis provided) (Add., pp. 14-15)

Mr. Turner complied with steps (1) and (2) and Respondents complied with step (3). This brings us to step (4), and to Section 100.4 (h) which, on the dates of these penalties assessments, did not contain any provision about what happens if the person charged does not accept the amended or reissued order and does not request a hearing. These Respondents neither accepted the orders nor requested a hearing, but instead stated in writing "that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of these penalties before the U.S. District Court." (Add., pp. 1-3)

At this point the Assessment Officer's authority under Section 100.4 (h) was exhausted, but he nonetheless transmitted another letter declaring that, since no hearing

had been requested, each order had been "entered as the final Order of the Secretary."

The proof that the Assessment Officer had no authority to take this action can be easily derived by a comparative reading of the text of Section 100.4 (h), as published on January 16, 1971, with the text of a corrective amendment adopted as 100.3 (h) on June 15, 1972, to provide the previously omitted finality authority:

> "100.4 (h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to *accept* the amended or reissued order, *whereupon* it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." (Add., pp. 14-15)
>
> "100.3 (h) The operator or miner charged shall have 20 days from the receipt of an amended or reissued proposed order to accept the proposed order, or to reject such proposed order in whole or in part and petition for hearing and formal adjudication. *Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary*." (Add., p. 16) (Emphasis provided in each quotation)

Whatever prospective legal effect this belated provision of authority in Section 100.3 (h) might have, it could in no way legitimize a previous unauthorized action of the Assessment Officer. All of the orders in these cases were issued prior to the corrective amendment of June 15, 1972, and consequently, the Assessment Officer's attempt to give them finality was in contravention of the long settled principle that an administrative agency may not ignore its own regulations and is bound by its own procedures.

One of the leading cases involving this principle is *Accardi v. Shaughnessy*, 347 U.S. 260, in which the Appellant challenged a denial of suspension deportation order under Section 19 (c) of the Immigration Act of 1917. The Appellant challenged the action of the Attorney General who, just prior to the consideration of the suspension request by the Board of Immigration Appeals, circulated a confidential list of "unsavory characters", including Appellant, whom he wished deported. Regulations under Section 19 (c) required the board, whose members were appointed by the Attorney General, to exercise its discretion and its decision was final except for such cases as by regulation it referred to the Attorney General. In reversing the denial of suspension, the Supreme Court said:

> "In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."[36]

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[36] See also *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535.

In unequivocal terms, in this case as well, the regulations provided for finality only in the event the operator chose "to accept" the order and where, as here, the operator neither accepted the order nor requested a hearing, the Assessment Officer had no right to sidestep the regulations or to dictate his decision that the orders were the final orders of the Secretary. The authorities make it clear that the Assessment Officer's effort to usurp the finality authority must be deemed a nullity, and in consequence, the orders involved in his actions are likewise a nullity and unenforceable as final orders under the Act.[37]

IV.

THE CASE IS MOOT.

We have argued in our brief in opposition to the Writ that this case is moot because the regulations under which these penalties were assessed were replaced by a new set of civil penalty assessment regulations in April 1973. We shall not repeat that argument here, except to note that the bar from mootness arises under Article III of the Constitution of the United States of America. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 and *Natural Milk Producers' Assn. of California v. San Francisco*, 317 U.S. 423, rehearing denied, 318 U.S.

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[37] Interestingly enough, the Interior Department's view of the nature of a proposed final order issued by the Assessment Officer seems to depend somewhat on the objective of the moment. For example, the Secretary's Associate Solicitor has stated that such an order is "simply in the nature of an offer of compromise. The operator is free to accept or reject the Order." (Add., p. 31) If we take this statement at face value, it seems self-evident that these offers of compromise cannot be converted into final orders by the unilateral action of the Assessment Officer.

798.[38] However, implicit in the Secretary's position in the case is the representation that he does not intend to reinstitute the former Part 100 regulations if he prevails in this case and that he will continue to use the new regulations in the present and future assessment of penalties. It is thus apparent that the Secretary's sole interest in the former regulations concerns his desire to be rid of what he regards as the troublesome burden entailed in the reassessment of the penalties invalidly assessed prior to April 1973. It is therefore in order to call attention to some of the questions raised by the data which the Secretary has offered to demonstrate the arduous nature of this reassessment work.

One of the points involved in these data is that 300 man weeks would be needed to reassess the 18,350 violations involved in the invalid penalties.[39] Another point is that, presently, the Assessment Office has a work force of 15 assessors.[40] The third point is that 80,000 notices of violations are issued each year.[41]

These data do not reconcile with one another. If we take them at face value, they demonstrate that the Assessment Office does not have sufficient staff to perform the assessment work arising under the present regulations and, if this is so, the Secretary's so-called administrative burden has been caused by his own failure to obtain, train, and allocate manpower properly.

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[38] In Natural Milk the complained of ordinance was nullified by the milk commission after the trial of the case.

[39] Reply Memorandum of Petitioner, App., p. 5, January 16, 1975 letter of the Solicitor of the Interior Department.

[40] Ibid, p. 4.

[41] Pet. B., p. 29.

Specifically, with 15 assessors, the Secretary has 770 man weeks annually to invest in assessment work. If 300 of these man weeks are required to reassess the 18,350 violations involved in this case, as asserted by the Secretary, the violations would be reassessed at the rate of about 62 violations per man week. With a force of 15 assessors, the 18,350 violations would be reassessed in about twenty weeks. Interestingly, if this same assessment rate (62 violations per man week) is applied for a full year's work by 15 assessors, we find that the number of violations that can be assessed in a year is slightly over 48,000. Thus, if 80,000 violations have to be assessed annually, the Assessment Office is falling behind in its assessment work under the present regulations by about 31,000 violations annually.[42]

Frankly, we doubt that such a serious deficit in assessments exists and we surmise that the irreconcilable nature of the data arises because the data submitted were prepared to support the arduous burden argument in respect to the 18,350 violations involved in this case, without taking the overall context into account. In any event, we submit that, at best, the Secretary has made a case of need for an appropriation with which to increase his force of assessors. This of course is a case which only the Congress can decide.

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[42] 18,350 violation ÷ 300 man weeks = about 62 violations per man week; 15 assessors x 52 weeks = 780 man weeks yearly; and 780 man weeks x 62 violations per man week = a yearly assessment rate of 48,360 violations.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

FRED BLACKWELL
1707 H Street, N.W.
Washington, D.C. 20006
Attorney for Respondents,
Delta Mining, Inc.,
G.M.W. Coal Company.

May 13, 1975

ADDENDUM

Add. 1

G. M. & W. COAL CO.
INC.
P. O. Box 99
State Line, Penna. 17263
Telephone: (717) 597-7803

June 7, 1972.

Assessment Officer
Department of the Interior
U. S. Bureau of Mines
Room 205-A
1725 K Street, N. W.
Washington, D. C. 20240

Attention: Mr. Everett Turner,
Assessment Officer

Re: G. M. & W. Coal Company, Inc.
Grove No. 1 Mine
Case No: 211C-3

Dear Mr. Turner:

We acknowledge receipt of your "final" order of assessment in the following alleged violations and in the following amounts:

Violation No.	Date Issued	Violation	Assessments
1 DWK	05-11-71	75.1712	$ 25.00
1 HKG	09-07-71	70.230	25.00
1 HKG	10-26-71	70.230	25.00
1 DHA	11-17-71	75.603	100.00
2 DSA	11-17-71	75.516	100.00
1 RCF	11-24-71	104(a) 75.400 75.403	5,000.00
2 DSA	12-01-71	75.307	25.00
		Total Assessed Amount	$5,300.00

This is to advise you that we do not accept these assessments as valid or proper, and that we stand on our statutory rights to contest the collection of the penalties before the U. S. District Court.

BEST COPY AVAILABLE

We have expended a great deal of time and gone to considerable expense to present to your office facts and circumstances bearing on the six statutory criteria, and in no instance has your office shown any disposition to give any considerations to the merits of our position on any of the matters that we have presented. Your office has admitted that it has no discretion to deviate frim the published minimum penalty schedule, despite the footnote reference which authorizes lesser penalties and no authority to vacate a citation even if shown to be erroneous.

We do not believe that we can expect any different treatment from your departmental hearing examiners, who, we are informed, pursue a uniform and deliberate policy of escalating penalty assessments even higher. We are financially unable to expend money for legal fees, and we are unwilling to take our safety personnel away from the mines, for extended periods of time in order to engage in another lengthy, costly and fruitless administrative proceeding before the Department which serves as policeman, prosecutor, judge, and jury in the penalty proceedings and has shown itself unwilling and incapable of exercising objective adjudication., Based on past experience it is almost certain that such a proceeding would result in a further escalation of the penalties assessed.

As we read the Statute we are entitled to a hearing de novo in the District Court and we intend to avail ourselves of our statutory rights.

We also wish to advise you that we reserve all our rights to question the statutory and constitutional basis for your assessments and your statutory authority. We also reserve our right to question your arbitrary and capricious assumption of the right to establish and apply a pre-determined minimum penalty schedule in such a manner as to ignore the explicit statutory criteria.

Sincerely,
G. M. & M. COAL COMPANY, INC.

C Kenneth Cratsley

C. Kenneth Cratsley
Secretary-Treasurer

CKC/cdn

cc: Frederick R. Blackwell
Thomas J. MacBride
File

Public Law 92-173, December 30, 1969

83 STAT. 742

An Act To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

30 U.S.C. 819

PENALTIES

Sec. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard of who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking of the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which

were or could have been litigated in review proceedings before a court of appeals under section 106 of this Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of title 28 of the United States Code, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Morton v. G.M.W. Coal Co., Inc.
No. 72-890, W.D. Pa.

Morton v. Delta Mining, Inc.,
No. 72-857, W.D. Pa.

EXTRACTS FROM

Hearing on Motions to Transfer commencing at 10:00 a.m. on Tuesday, January 16, 1973, in the United States District Court, Pittsburgh, Pennsylvania before the Honorable Wallace S. Gourley.

Appearances:

On behalf of the Plaintiff:

Alex L. McNaugher
Assistant U.S. Attorney

On behalf of the Defendant:

Frederick R. Blackwell, Esquire.

* * *

[18] MR. BLACKWELL: Your Honor, I have in mind a motion for summary judgment after these depositions.

THE COURT: If the government says that you have violated a law and you say that you haven't, I cannot grant you a motion for summary judgment. I know that you big law firms file all these motions; I did the same thing myself.

MR. BLACKWELL: Sir, I am a solo practicioner.

THE COURT: Successful sole practicioners do it. I was a sole practicioner.

* * *

[19] THE COURT: The case is so simple. You either did or did not violate the law. It is a question of credibility.

The government will have witnesses come in and say that you did. You, more than likely, will have witnesses come in and say that you didn't. The judge has to decide.

MR. BLACKWELL: We believe that there is more to the case than that. We believe that the [20] civil penalty procedures are illegal under the Act, Your Honor. And we believe the assessment –

THE COURT: I have previously ruled that they are not but you always have the right to ask questions. I don't see anything involved in this case at all. I can't see anything puzzling about it at all.

The government says that they have followed the basic, fundamental tenets required by the Act in assessing the penalty; you say they didn't. The court hears it de novo. It is just a question of calling your witnesses and the judge decides who he is going to believe. You don't have the substantial evidence rule. I don't care what is in record; that doesn't concern me. It is what they say in the Courtroom that matters.

MR. BLACKWELL: Our position, Your Honor, is that if the assessment were illegally made and if their procedures did not conform to the statute, they do not have a legal entity which they can come into Court and force the client into a de novo trial.

THE COURT: The government says that they did it in their complaint, did they not?

MR. BLACKWELL: Yes.

THE COURT: You say that they did [21] not. So, I have to hear the evidence on whether they did or didn't. How can any Court decide it without hearing the witnesses?

MR. BLACKWELL: Well, my analysis of the case is that if the government is wrong in their illegal assessment procedure, then there will not be a hearing of the witnesses on the violation.

THE COURT: How is any judge going to decide whether they are right or wrong?

MR. BLACKWELL: On the illegality of the procedure?

THE COURT: What you were just talking about.

MR. BLACKWELL: I believe that we will be able to show that from the testimony that we receive from the Assessment Officer, Mr. Turner.

THE COURT: That can all be brought out at the time of trial. Why make this case hard when it can be easy?

MR. BLACKWELL: Well, my view of it, Your Honor, is if we are right on the assessment procedure being illegal, there should not be a trial. This should be resolved in the motion that I was –

THE COURT: I deny such a motion. I am going to hear the whole case as I have told you on the 14th day of February, 1973, at 10:00 a.m.

MR. BLACKWELL: Thank you very much, Your Honor.

* * *

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: Bates Mining, Incorporated
Operator

Mine No. 2312

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE

NOTICE OR ORDER OF ASSESSMENT DATED April 11, 1972

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward M. Turner
ASSESSMENT OFFICER

BEST COPY AVAILABLE

Add. 10

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: C. H. and V. Coal Company, Incorporated
Operator

Case No. 2110-2

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE _____

PROPOSED ORDER OF ASSESSMENT DATED December 27, 1971

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward L. Furman
ASSESSMENT OFFICER

Add. 11

United States Department of the Interior

BUREAU OF MINES
WASHINGTON, D.C. 20240

Re: C. H. and V. Coal Company, Incorporated
Operator

Case No. 2110-1

August 17, 1972

I HEREBY FIND THAT THE VIOLATIONS CITED IN THE Amended

PROPOSED ORDER OF ASSESSMENT DATED May 31, 1972

DID, IN FACT, OCCUR AND ACCORDINGLY ADOPT THE ASSESSMENT SET FORTH THEREIN AS FINAL.

Edward L. Furman
ASSESSMENT OFFICER

BEST COPY AVAILABLE

Title 30 – MINERAL RESOURCES

Chapter 1 – Bureau of Mines,
Department of the Interior

SUBCHAPTER 0 – COAL MINE HEALTH AND SAFETY

PART 100 – CIVIL PENALTIES FOR VIOLATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter 0 of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100 as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maximum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry. Part 100 shall

become effective on the date of its publication in the Federal Register (1-16-71)

Fred J. Russell,
Under Secretary of the Interior.

January 14, 1971.

* * *

§100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b)(1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the

demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g)(1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued

order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

* * *

Title 30 – MINERAL RESOURCES

Chapter 1 – Bureau of Mines,
Department of the Interior

SUBCHAPTER 0 – COAL MINE HEALTH AND SAFETY

PART 100 – CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

On June 8, 1972, appearing in 37 F.R. 11459, the Department of the Interior published amendments to the procedural rules applicable to hearings in civil penalty cases under the Federal Coal Mine Health and Safety Act of 1969. These amendments were primarily contained in Part 4, Title 43, Code of Federal Regulations with conforming amendments in Part 100, Title 30, Code of Federal Regulations. To provide the public with an opportunity to become familiar with the new procedure and insure an orderly changeover, the regulations were not to be effective until June 15, 1972. However, in making these conforming amendments, §§100.3(d), (e), and (f) which should have been amended were inadvertently omitted. The purpose of this document is to properly conform §100.3. In making these conforming amendments §100.3(h) has also been modified. These conforming amendments to §100.3 make clear that a party may petition for hearing either upon receipt of the initial proposed order of assessment or upon receipt of an affirmed or amended proposed order of assessment. In addition, the time periods for filing an informal protest or a formal petition for hearing are made identical.

These procedural rules are used extensively throughout the coal mining industry and are often used by parties who are not attorneys. To allay any uncertainty these parties may have and to provide a complete and convenient reference to Part 100, the Department has decided to republish Part 100 as amended in its entirety. These amendments to Part 100, Title 30, Code of Federal Regulations, are effective June 15, 1972.

Richard R. Hite
Deputy Assistant Secretary
of the Interior.

June 13, 1972.

* * *

§100.3 Procedures for assessment of civil penalties; protest procedures.

* * *

(h) The operator or miner charged shall have 20 days from the date of receipt of an amended or reissued proposed order to accept the proposed order, or to reject such order in whole or in part and petition for hearing and formal adjudication. Unless the operator or miner charged files a timely petition for hearing and formal adjudication an amended or reissued proposed assessment order shall become the final assessment order of the Secretary.

RULES AND REGULATIONS

[39 F.R. 27558]

Part 100 – Civil Penalties for Violations of the Federal Coal Mine Health and Safety Act of 1969

REVISION AND REINSTATEMENT OF PROCEDURES FOR INFORMAL ASSESSMENT

There was published in the Federal Register on May 8, 1974 (39 FR 16145-16151) proposed procedures for informal assessment of civil penalties for violations of the Federal Coal Mine Health and Safety Act of 1969. These proposed regulations were preparatory to reinstatement of the informal assessment program contained in Title 30, Code of Federal Regulations, Part 100, which had been suspended on April 24, 1973 (38 FR 10085). This suspension was in effect pending appeal of a decision and order of the United States District Court for the District of Columbia in "National Independent Coal Operators Association, et al. v. Rogers C.B. Morton, Secretary of the Interior, et al.," Civil Action No. 397-72 in which the District Court had declared unlawful the procedures set forth in 30 CFR Part 100. On February 11, 1974, the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and upheld the validity of the Department's civil penalties procedures.

* * *

[39 F.R. 27559]

The National Independent Coal Operators Association did not offer substantive comments on the regulations but rather criticized them as being illegal. As a precedent they cited the decision of the U.S. Court of Appeals for the Third Circuit in "Rogers C.B. Morton, et al. v. Delta Mining, Inc., GM&W Coal Corporation and Edward

Mears, et al.," Nos. 73-1752, 1753 and 1848. The NICOA argues that any assessment procedures which does not require the submission of a penalty case to an administrative law judge for findings of fact in accordance with the Administrative Procedure Act is illegal.

The Third Circuit decision is in conflict with the District of Columbia Circuit decision mentioned above. However, in the Department's view the new procedures set forth below are in accord with both the District Court, and the Third Circuit decision. The Third Circuit distinguished the District of Columbia Circuit's decision on the basis that the operator had filed a protest. Under these rules where an operator requests a conference (the equivalent of the old protest), all unresolved violations are forwarded to the Office of the Solicitor for filing with the Office of Hearings and Appeals to permit an opportunity for hearing and findings of fact by an administrative law judge.

Much effort has gone into preparation of these new procedures and the Department considers them to be a substantial improvement. The Department believes that this system permits a fair evaluation of the violation at an informal level. The new procedures will be reviewed periodically and additional improvements will be implemented.

The new rules will become effective August 1, 1974.

Kent Frizzell,

Acting Secretary of the Interior.

July 24, 1974.

* * *

§100.6 Request for conference.

(a) The Office of Assessments shall provide a return mailing card with each order of assessment to allow the operator or miner to indicate his desire to have a conference. Upon receipt of such request, the Office of Assessments shall arrange for a timely conference convenient to both the operator or miner and the Office of Assessments.

(b) If the operator or miner requests a conference with the Office of Assessments, he may submit any additional material to the official assigned his case which may be relevant to the fact of the violation or the amount of the penalty. Such information may be submitted prior to the conference and discussed during the conference. To expedite the conference, the official assigned to the case may contact the operator or miner to discuss the case prior to such conference.

(c) The Office of Assessments will consider all relevant information on the violation(s) in question presented by the operator or miner and is authorized to recalculate the assessed penalty to it. When the facts warrant a finding that no violation of the Act or a mandatory health and safety standard occurred, a penalty will not be assessed.

(d) If the operator or miner appears in person and the issues are resolved, he may, at this time, tender payment of the amount agreed upon and thereby dispose of the case, or he may have 10 days within which to to submit payment to the Office of Assessments of the amount agreed upon and thereby dispose of the case. All such agreements must be in writing and signed by both parties. Failure to tender payment of the agreed amount within the 10-day period will result in the agreed

amount being entered as the final order of the Secretary, enforceable under section 109(a)(4) of the Act.

(e) If all issues cannot be resolved during the conference, the operator or miner may settle those violations in agreement as provided in §100.6(d) and have those deleted from the case. Violations not resolved will be forwarded to the Associate Solicitor – Mine Health and Safety, who shall file a petition to assess a civil penalty with the Office of Hearings and Appeals of the Department of the Interior pursuant to 43 CFR 4.540.

* * *

TITLE 43 – PUBLIC LANDS: INTERIOR
SUBTITLE A – OFFICE OF THE
SECRETARY OF THE INTERIOR

PART 4 – DEPARTMENT HEARINGS AND APPEALS PROCEDURES

SUBPART F – SPECIAL RULES APPLICABLE TO MINE HEALTH AND SAFETY HEARINGS AND APPEALS

Amendment of Civil Penalty Assessment Procedures Under the Federal Coal Mine Health and Safety Act

* * *

1. Sections 4.540 through 4.545 subpart F of Subtitle A of Title 43 of the Code of Federal Regulations are amended to read as follows:

§4.540 *How initiated.*

(a) A proceeding for the assessment of a civil penalty shall be initiated by the Bureau by filing a petition to assess civil penalty with the Office of Hearings and Appeals.

(b) The Bureau's petition for assessment of civil penalty shall include a list of the cited violations for which a civil penalty is sought to be assessed. Each cited violation shall be identified by number and date of the notice or order involved and the section of the Act or regulations which the Bureau alleges has been violated.

(c) A copy of each notice or order issued concerning each cited violation for which a civil penalty is sought to be assessed shall be attached to the petition.

(d) Where appropriate the Administrative Law Judge (formerly titled Hearing Examiner) shall consolidate civil penalty proceedings with other proceedings described herein.

* * *

[Extract from PL 91-510]

CONFERENCE REPORTS

Sec. 125. (a)(1) The section caption of section 135 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190c) is amended to read as follows:

"SENATE CONFERENCE REPORTS".

(2) Section 135 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190c) is amended by adding at the end thereof the following new subsections:

"(c) *Each report made by a committee of conference to the Senate* shall be printed as a report of the Senate. As so printed, such report *shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate.* Such statement shall be sufficiently detailed and explicit to inform the Senate as to the effect which the amendments or propositions contained

in such report will have upon the measure to which those amendments or propositions relate.

"(d) If time for debate in the consideration of any report of a committee of conference upon the floor of the Senate is limited, the time allotted for debate shall be equally divided between the majority party and the minority party.".

(3) The item relating to section 135 contained in the table of contents of the Legislative Reorganization Act of 1946 (60 Stat. 813) is amended to read as follows:

"Sec. 135. Senate Conference Reports.".

(b)(1) Paragraph (c) of clause 1 of Rule XXVIII of the Rules of the House of Representatives is amended to read as follows:

"(c) *Each report made by a committee of conference to the House* shall be printed as a report of the House. As so printed, such report *shall be accompanied by an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate.* Such statement shall be sufficiently detailed and explicit to inform the House as to the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate.".

(2) Clause 2 of Rule XXVIII of the Rules of the House of Representatives is amended to read as follows:

"2. It shall not be in order to consider the report of a committee of conference unless such report and the accompanying statement shall have been printed in the Record, at least three calendar days (excluding Saturdays, Sundays, and legal holidays) prior to the consideration of such report by the House; but this provision does not apply during the last six days of the session.

Nor shall it be in order to consider any conference report unless copies of the report and accompanying statement are then available on the floor. The time allotted for debate in the consideration of any such report shall be equally divided between the majority party and the minority party.".

(3) Clause 3 of Rule XXVIII of the Rules of the House of Representatives is amended –

(1) by striking out ", but their report shall not include matter not committed to the conference committee by either House."; and

(2) by inserting in lieu thereof the following: ", but the introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement. Moreover, their report shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee.".

(Emphasis supplied).

[EXTRACT FROM]

Calendar No. 192

91st Congress
1st Session

SENATE REPORT No. 91202

Legislative Reorganization Act of 1969

May 23, 1969
Ordered to be printed

Mr. Mundt, from the
Committee on Government Operations
submitted the following

Report

[to accompany §844]

* * *

Conference Reports

Under existing rules and practice, conference reports are printed as House Reports and must be signed by both Senate and House conferees. However, the statement accompanying such report explaining the action taken in conference, is filed only by the House conferees, as required by the rules of that body. The Rules of the Senate make no provision for the filing by Senate conferees of an accompanying statement. Furthermore, the precedents of the House of Representatives do not permit the filing by House conferees of minority or individual views, and the time for debate is limited strictly.

The Joint Committee On The Organization Of The Congress, in recommending liberalization of conference procedures, noted that the conference committee is one of the most vital links in the bicameral Congress, since it operates on an *ad hoc* basis for a single bill; its grant of legislative authority is enormous; it must reconcile the differences in legislation on the same subject matter

passed by the two Houses; and rejection of a conference report by either House means the death of the entire bill. Accordingly, it recommended that the membership of the Senate be given an opportunity equal with that of the House to inform itself adequately on a conference report, prior to a vote; and that the minority be given full opportunity to express its views, both in writing and during the final debate.

S. 844 would implement these recommendations by (1) requiring that conference reports be printed as a report in each House and be accompanied by an explanatory statement prepared by the conferees from that House, thus conforming Senate practice to that of the House; (2) permitting any conferee to file an individual explanatory statement as an appendix to the statement of the conferees of his House; and (3) requiring that the minority be allotted half of the time allotted for debate on a conference report if debate is limited.

* * *

[Descriptive Heading and Signature Pages
of Conference Report on S. 1917]

HOUSE OF REPRESENTATIVES

91st Congress
1st Session

Report No. 91-761

FEDERAL COAL MINE HEALTH AND SAFETY ACT

December 16, 1969 — Ordered to be printed

Mr. Perkins, from the committee of conference,

submitted the following

CONFERENCE REPORT

[To accompany S. 2917]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2917) to improve the health and safety conditions of persons working in the coal mining industry of the United States, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

* * *

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill, and agree to the same.

Carl D. Perkins,
John H. Dent,

Roman Picinski,
Augustus F. Hawkins,
Patsy T. Mink,
Phillip Burto n,
Will H. Ayres,
John N. Erlenborn,
Alphonzo Bell,
Dominick V. Daniels,
John M. Ashbrook

Managers on the Part of the House.

Harrison Williams,
Jennings Randolph,
Clai Pell,
Gaylord Nelson,
Walter F. Mondale,
Thomas F. Eagleton,
Alan Cranston,
J. Javits,
Winston Prouty,
Richard S. Schweiker,
Wm. B. Saxbe,
Ralph T. Smith,

Managers on the Part of the Senate.

STATEMENT OF MANAGERS ON THE PART OF THE HOUSE

* * *

Carl D. Perkins,
John H. Dent,
Roman Pucinski,
Augustus F. Hawkins,
Patsy T. Mink,
Phillip Burton,

William H. Ayres,
John N. Erlenborn,
Alphonzo Bell,
Dominick V. Daniels,
John M. Ashbrook,

Managers on the Part of the House.

[Descriptive Heading and Signature Pages of a Conference Report on bill handled after enactment of Legislative Reorganization Act of 1970]

HOUSE OF REPRESENTATIVES

93d Congress
2d Session

Report
Report No. 73-1175

COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT

July 3, 1974 – Ordered to be printed

Mr. Perkins from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 3203]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 3203) to amend the National Labor Relations Act to extend its coverage and protection to employees of nonprofit hospitals, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

* * *

And the House agree to the same.

Carl D. Perkins,
Frank Thompson, Jr.,
William D. Ford,
W.L. Clay,
Albert H. Quie,
John M. Ashbrook,

Managers on the Part of the House.

And the Senate agree to the same.

Harrison Williams,
Jennings Randolph,
Claiborne Pell,
Gaylord Nelson,
Thomas F. Eagleton,
Harold E. Hughes,
W.D. Hathaway,
Alan Cranston,
J. Javits,
Richard S. Schweiker,
Robert Taft,
Robert Stafford,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

* * *

And the House agree to the same.

Carl D. Perkins,
Frank Thompson, Jr.,

William D. Ford,
W.L. Clay,
Albert H. Quie,
John M. Ashbrook,

Managers on the Part of the House.

And the Senate agree to the same.

Harrison Williams,
Jennings Randolph,
Claiborne Pell,
Gaylord Nelson,
Thomas F. Eagleton,
Harold E. Hughes,
W.D. Hathaway,
Alan Cranston,
J. Javits,
Richard S. Schweiker,
Robert Taft,
Robert Stafford,

Managers on the Part of the Senate.

[Extract From Bureau of Mine Brief]

IN THE MATTER OF:	)	
ROBERT G. LAWSON	)	Docket No. NORT 71-106-P
t/a ROBERT G.	)	
LAWSON COAL CO.	)	CIVIL PENALTY PROCEEDING
No. 3 Mine	)	

Appellant

BRIEF OF APPELLEE, BUREAU OF MINES

* * *

These regulations set up machinery whereby, in the first instance, coal mine operators are assessed a civil penalty, for appropriate violations of the Act, by an Assessment Officer in the Bureau. Any proposed final Order of Assessment issued by such officer is simply in the nature of an offer of compromise. The operator is free to accept or reject the Order. While the proposed Assessments are uniform as to the industry as a whole, once an operator exercises *his* option to reject such final order and seek formal adjudication, all that transpired before the Assessment Officer is immaterial and irrelevant to the Department's Office of Hearings and Appeals. Formal adjudication is instituted by the Solicitor's Office at such time as it files a Petition for Assessment of Civil Penalty with the Hearings Division, Office of Hearings and Appeals. When an operator demands formal adjudication he is not appealing the Assessment Officer's final Order. Once the operator requests formal adjudication the proceeding is *de novo*.

* * *

Thomas J. MacBride
Attorney-at-Law

P. O. Box 108
100 Wynnecrest Drive
Waynesboro, Pa. 17268
717-762-6338

5.3.0-

3/72. Review Et

'72 MAR 23 PM 1:04

March 17, 1972

Mr. Frederick R. Blackwell
Attorney At Law
Suite 860 Bender Building
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

RE:G. M. & W. COAL CO., INC.
Case No. 2110-3
Grove No. 1. Mine

Dear Fred:

The assessment inthis case is Five Thousand Three Hundred Dollars ($5,300.00) and the violations taken chronologically from the Order are as follows:

FILE NO. 25 - Section 75.1712: This is a bath house facility violation. The difficulty in this case involved the acquiring of the land onwhich to locate the building. The land to which the company had title and possession was all filled land from the former stripping operation. After considerable difficulty the necessary small piece of ground was acquired and the company ran into the difficult position of securing sewerage disposal permits. After prolonged efforts these were secured and work was promptly begun. Work on this facility has now been completed. The company moved with all possible speed in this matter, it must also be remembered that this was a newly opened mine.

FILE NO. 27 - Section 70.230: This is a failure to submit current sampling in section .003. Four (4) samples had been taken and a mine inspection team from the Bureau of Mines came in and advised Mr. Davis, the mine engineer, that he could stop sampling since they were there and would be sampling. This appeared to be a rather lengthy mix-up and even the District Office recognized this mix-up since they extended the period within which it was to be abated four (4) times. There is not much of a defense besides this and the sampling

was started again and is okay.

FILE NO. 31 - Section 70,230: This is another dust sampling violation in section .004. The only statement that we can make is that we were having trouble coursing the air around the mining machine and until air regulators on the return were completed any samples submitted would have been badly in violation. The sampling simply was not done, until the air problem was resolved.

FILE NO. 34 - Section 75.603: This involves a temporary splice nine (9) feet from the machine. There is no defense as the splice was there. The men know better and the operator will "raise hell" in an effort to see that it never happens again.

FILE NO. 33 - Section 75.516: This was a power cable not on insulators violation. The violation charged actually occured, however, the operator has tried repeatedly to hire experienced electricians, they just are not available. The operator has been trying to train two (2) new electricians at this time and although training is moving at a reasonably good pace, nevertheless, the additional requirements of training these men to be aware of compliance standards as well as the technical aspects of their jobs has extended their training periods. The men were finally impressed with the need for picking the cable up, it was hung on aluminum wire hooks rather than insulators which were available. It would seem that this violation should not carry more than the minimal fine.

FILE NO. 36 - Section 104(a) 75.400 & 75.403: This was an eminent danger violation and we can only point out that this was the case where the mine inspector "eyeballed" the situation and concluded that the rock dust was inadequate. The violation occured at the place where the bottom is badly slanted and loose coal was being dropped from the shuttle cars on occassion. The bottom was extremely wet and sloppy and the inspector in attempting to sample the area found the loose coal to be so wet that it could not even be sifted for the sample. We feel that this is a violation which was "eyeballed" by the inspector during a planned "loose coal and coal dust drive". The company had at

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this time made a commitment for a Thirty Thousand Dollar ($30,000.00) new scoop which has been delivered and is used to pick up even the wet spill coal.

FILE NO. 35 - Section 75.307: This is a methane violation and about the only explanation is the human element. Both the foreman and the operator had methane measuring devices in their possession. The operator was a new man and explained to the foreman that with the examiner standing over him he felt uncomfortable and admitted to becoming rather excited and simply forgot to make the methane examination when he was "under the gun".

Very truly yours,

Thomas J. MacBride

TJM/cdh
CC: G. M. & W. COAL CO., INC.
file

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

NOV 19 1973

Mr. Frederick R. Blackwell
Attorney at Law
Suite 860
Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Delta Mining, Inc.
G M & W Coal Co., Inc.

Dear Mr. Blackwell:

We are in receipt of your two checks totaling $13,467.00. This payment is accepted in full settlement of the cases listed in your letter of November 9, 1973.

Thank you for your cooperation.

Very truly yours,

John P. McGeehan
Trial Attorney

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November 9, 1973

John P. McGeehan
Attorney, MESA
U. S. Department of the Interior
Office of the Solicitor
Washington, D. C. 20240

Re: Settlement of Bureau of Mines proposed civil penalties against G.M.&W. Coal Co., Inc. (Grove Mine # 1 and Metro 333 Mine) and Delta Mining, Inc.

Dear Mr. McGeehan:

I am writing in regard to the above which covers the following Bureau of Mines proposed civil penalties and/or civil penalty assessment orders:

G. M. & W. COAL CO., INC.

Grove Mine # 1		
[illegible]21-10	May 31, 1972	$3675.
21-10-4	June 27, 1972	1930.
21-10-05	December 29, 1972	7845.
21610-21	February 9, 1973	685.
21-10-22	February 12, 1973	555.
21-10-23	February 12, 1973	1070.
Metro #3 Mine		
22-65	April 23, 1971	325.
22-65-1	June 6, 1972	1850.
22-65-2	August 16, 1972	5130.
22-65-3	June 6, 1972	5960.
22-65-4	July 28, 1972	815.
22-65-21	February 28, 1973	365.

DELTA MINING, INC.

23-12-1	August 9, 1972	$565.
23-12-2	September 8, 1972	455.
23-12-3	October 18, 1972	280.
23-12-4	October 24, 1972	905.
23-12-21	February 2, 1973	750.

In final satisfaction, disposition, and settlement of the above listed proposed civil penalties and/or civil penalty assessment orders, but without making any, or implying any, admission that any of the involved alleged violations of standards under the Coal Act did in fact occur, and solely for business considerations, I am enclosing checks totalling $13,467. in full payment of the foregoing civil penalties and/or civil penalty assessment orders. This payment is made by the two enclosed checks payable to the order of the U. S. Dept. Interior as follows: (1) Delta Mining, Inc. check #1278, dated November 1, 1973, in the sum of $2,180. and (2) G. M. & W. Coal Company Inc. check #505. dated November 1, 1973, in the sum of $11,287.

Yours sincerely,

Frederick R. Blackwell

cc:
Dwight L. Grove
Thomas J. MacBride

sb

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